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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Committee's inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn has a proud history of partnering with Aboriginal and Torres Strait Islander communities in bringing legal claims to protect their land and cultural heritage. We are pleased to offer the Committee our insights, which are directly derived from our legal work in the field, and the lived experience of our clients.

We successfully challenged the Commonwealth Government and the Northern Land Council over plans for a radioactive waste dump on Indigenous land in the Northern Territory known as Muckaty Station. We then acted on behalf of the Adnyamathanha Traditional Lands Association (ATLA), who successfully opposed the placement of a radioactive waste facility on their traditional land in the Flinders Ranges.

Maurice Blackburn subsequently represented ATLA in relation to the alleged desecration of a sacred women's site by Commonwealth contractors during the site nomination process.

We have consulted with the women involved in the abovementioned matter in the development of this submission. They have offered their full support for, and endorsement of its contents.

Maurice Blackburn and our community partners believe that if there was better application of UNDRIP, then a number of core issues which impact the lives of Aboriginal and Torres Strait Islander Australians would be positively impacted, and in particular, their heritage and culture would be safer. This is both tangible and intangible heritage.

We draw the Committee's attention to the fact that UNDRIP is not currently binding in Australian law. While our Governments have pledged support for the principles of UNDRIP, the non-binding nature of such commitments means that there is no effective enforcement of those principles.

A recurring theme that we see through our work is that there is insufficient legal protection of the cultural heritage of Aboriginal and Torres Strait Islander people, and inadequate legal remedies available where cultural heritage desecration has occurred. We firmly believe that if UNDRIP principles were to be adopted into Australian law, that cultural heritage protection would be greatly improved.

We urge the Committee to consider recommending that adherence with the UNDRIP principles be written in to all relevant State/Territory and federal laws.

We offer the following as potential benefits of this course of action:

Reduction of Conflict Between State and Commonwealth Laws

In our experience, protections for Indigenous heritage at the state level are ineffective when they come into conflict with Commonwealth laws.

For example, in one of our matters our clients were informed by the South Australian Department of Premier and Cabinet that no prosecution would be available in response to allegations of disturbing an Aboriginal Heritage site because the conduct was authorised by the *National Radioactive Waste Management Act 2012* (Cth).

We also draw the Committee's attention to the changes bought through the agreement, at the Commonwealth level, of the *National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020*[1], which passed the Parliament in June 2021.

Maurice Blackburn at the time expressed concern with several amendments proposed in the Bill which appeared to remove and erase engagement with the Aboriginal community from the site selection process. This Bill, among other issues, did not include any explicit protection or consideration of Aboriginal cultures or heritage.

Provisions within the Bill in relation to procedural fairness were limited in scope and failed to prescribe any requirements for the Minister to meaningfully consider community views or submissions. The Bill also removed the right to judicial review and greatly narrowed the review rights of an administrative decision once the site selection process is underway.

The passing of such legislation at the federal level makes management of Aboriginal Heritage at the state level extremely complex. State management of Aboriginal heritage is already limited in scope, and contraventions of the relevant schemes are only prosecuted in rare circumstances. It is our understanding that in the history of the scheme very few prosecutions have occurred for breaches of the Act.

[1] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6500

Maurice Blackburn believes that if UNDRIP principles were enshrined in both the State and Federal legislation, it would be less likely that such conflict would occur.

Strengthening of Aboriginal Heritage protection

Maurice Blackburn offers three immediate benefits to the embedding of UNDRIP principles into Australian laws, that would greatly enhance heritage protection:

i. It would enshrine the importance of proper consultation

Article 19 of UNDRIP reads:[2]

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

If this principle were to be embedded in Australian law, then any legislative or regulatory reform in this area would be required to recognise the need for proper and full consultation with the appropriate Traditional Owners.

A recurring theme in our work is that our clients believe the government, government agencies or companies have not adequately valued the views of their community. Specifically, our clients tell us that they are not listened to, nor meaningfully consulted during processes which lead to decisions involving their traditional lands.

An example of this was during the nomination process for the proposed radioactive waste facility at Wallerberdina Station in the Flinders Ranges. Our client, ATLA, as the peak body for Adnyamathanha people, passed a number of resolutions making clear their opposition to the radioactive waste facility. Despite this, the Commonwealth failed to acknowledge those resolutions in their decision making.

Further, despite multiple requests for inclusion, many Adnyamathanha native title holders were excluded from the Commonwealth funded ballot held to assess community support for the proposed facility. By excluding many Adnyamathanha people from the ballot, the Commonwealth reinforced the view held by many Traditional Owners that their deep connection to the land was not respected. We draw the Committee's attention to the fact that if Native Title has been extinguished or is yet to be found on certain areas of land, it does not mean that significant cultural heritage sites do not exist. Consultation with Traditional Owners remains incredibly important to determine the location of culturally important sites.

Even when consultation does occur, it must be done in a meaningful way and with the right people. For example, in situations where the Commonwealth has engaged directly with our clients, such as inviting them to make submissions to government bodies, our clients' perception was that little weight was placed on these submissions. Our clients have instructed us that even when there are consultation procedures in place, they often feel these are in place as a formality and that the consultation is done in a perfunctory manner, with little meaningful engagement with the communities. There continues to be a widely held perception amongst our clients that consultation processes, as currently carried out, remain a

[2] https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf: p.16

'box-ticking' exercise rather than genuine dialogue and engagement. The enshrining of Article 19 would go some way to alleviating this.

Another common theme that arises from our cases is a failure of government bodies or companies to engage with, or consult **the appropriate** traditional owners. Examples of this behaviour include speaking with male community members regarding women's cultural heritage issues or primarily engaging with individuals that do not represent the community or peak body in relation to cultural heritage issues.

In another matter we are involved in, a company engaged with an individual from the community to obtain access to cultural stories, but that individual did not have the authority to share such stories. This resulted in cultural harm occurring where a significant, sacred story that should only be heard by women, was misappropriated and was publicly available to members of the public.

Overall, our experience is that the current approach to engagement with Aboriginal and Torres Strait Islander communities on issues of heritage often results in a disconnect between the government authorities or companies and these communities. We have seen communities feel disrespected, isolated from decisions being made about their land and concerned about cultural harm occurring.

This feeling of disenfranchisement can be addressed, at least partially, through the development of proper protocols and processes, based on UNDRIP principles, which give guidance to meaningful engagement with Traditional Owners. These processes and protocols must be developed in partnership with the affected Traditional Owners.

In the absence of principles underpinning consultation, cultural heritage damage is significantly more likely to occur and we see long term damage not only to the cultural heritage but also to the relationships between the communities and the government authorities or companies.

ii. It would enshrine the importance of protecting both tangible and intangible heritage

Article 11 states:[3]

> *11.1 Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

In our experience, Aboriginal communities have had significant complaints about the heritage assessment processes and reports that have been undertaken prior to ground disturbing work being done that affects intangible cultural heritage.

The legislated embedding of UNDRIP principles would require a clearly demonstrated commitment to undertake comprehensive heritage assessments based on best practice standards and in partnership with the appropriate Traditional Owners.

An example of this is the heritage assessment process undertaken in relation to the proposed radioactive waste management facility site at Wallerberdina Station. This

[3] Ibid: p.11

assessment process was clearly inadequate. In summary, the main issues with this Aboriginal Cultural Heritage Assessment were that:

> a. It did not meet the Ministerial and Departmental commitment to producing a comprehensive report;
>
> b. It was not undertaken in an unbiased, impartial or autonomous manner and therefore could not be considered independent;
>
> c. It was not undertaken in accordance with established Commonwealth or Industry best practice guidelines; and
>
> d. It did not meet the Ministerial commitment to protect cultural heritage, as it failed to consider the nature, extent and significance of all cultural heritage values.

Federal and State Ministers, authorities, government departments and private entities can demonstrate they take Aboriginal cultural heritage and consultation seriously by:

> 1. Engaging and communicating with leaders of the relevant Aboriginal and Torres Strait Islander community. This should be by communicating with the relevant peak bodies for the area; and
>
> 2. Commissioning, in consultation with the traditional owners, a comprehensive heritage assessment of the proposed site, prior to the commencement of any ground disturbance work or site testing. This heritage assessment should be in line with best practice.

Accordingly, enshrining the UNDRIP principles in legislation would further strengthen the protection of intangible Aboriginal Heritage.

iii. It would enshrine the importance of protecting Aboriginal intellectual property

Article 11 goes on to say:[4]

> *11.2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

In Maurice Blackburn's experience, issues with protecting Aboriginal intellectual property arise due to the nuances of collective ownership and difficulties in defining ownership within existing frameworks.

Our understanding is that it is not always possible or appropriate to attribute ownership of Aboriginal intellectual property to a single person or party. Ownership of intellectual property, such as sacred stories, rests with a community and not an individual. Some individuals (such as elders) occupy roles as custodian or Knowledge Keepers. Our clients tell us that these custodians hold traditional language, knowledge of story places, including sacred cultural practices and stories.

[4] Ibid: p.12

In addition to the standard protections afforded by intellectual property law, issues often arise in Aboriginal intellectual property that are not infringements of rights as they made be understood by non-Aboriginal people.

For example, accuracy in the portrayal of telling a story is of great importance, and some knowledge and many stories are restricted on the basis of gender, being either 'men's business' or 'women's business' and should not be viewed by a particular gender.

Misuse or a violation of Aboriginal intellectual property can occur where sacred or confidential stories are disclosed to the wider public, or where work has been reproduced or published in a culturally inappropriate way or devoid of the cultural context conveying the importance of the stories, or where gender restricted information is made public or available to the incorrect gender. This in turn causes a collective injustice in the form of cultural harm. We are also aware of circumstances where sacred stories are misrepresented or modified causing a distinct type of cultural harm.

Our understanding is that it is the responsibility of Traditional Owners to take action to preserve sacred knowledge and to punish individuals within the community held to be responsible for the misuse of the story. As can be seen, the misuse of Aboriginal intellectual property may not fit cleanly into non-Aboriginal understanding of intellectual property rights and remedies.

In relation to restitution, it is vital that Traditional Owners are consulted when it comes to determining the specific remedies that are being sought. As noted earlier, Maurice Blackburn assisted a number of ATLA women in their case related to the alleged desecration of a sacred women's site by Commonwealth contractors. In this matter, the remedies were designed by the women themselves. We believe this should be seen as the culturally appropriate and standard way in which remedies are determined.

While restitution is highlighted in Article 11 in the context of intellectual property, we submit that the mechanisms described above should apply across the board in matters of heritage protection.

In acting for clients who have experienced the misuse of their intangible heritage, we have found the existing legal framework around intellectual property rights inadequate, and not able to provide an appropriate remedy for the harm suffered by individuals and the wider community.

We strongly recommend that Aboriginal intellectual property is specifically and separately protected in legislation, either by an amendment to the Act or other legislation. It is important that any separate legislation, or adjustments to existing legislation makes clear that the UNDRIP principles must be demonstrably adhered to.

We do not propose to comment on the specific form of this knowledge and leave that to Traditional Owners, submitting only that any law should be founded on UNDRIP principles, and framed in a manner that accounts for the collective ownership of stories and knowledge, and remedies the collective harm that our clients have described to us.

Yours faithfully,

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